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Attorneys for Defendants
Woodbine Alaska Fish Company,
and Guy Ferrari Inc.

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF ALASKA

CITICAPITAL COMMERCIAL CORP,)
Plaintiff,)

v.)

EGEGIK SPIRIT, official number 2999957,)
her equipment, gear, furniture, apparel,)
fixtures, tackle, boats, machinery, anchors)
and all appurtenances, in rem;)
NAKNEK SPIRIT, official number 585824,)
her equipment, gear, furniture, apparel,)
fixtures, tackle, boats, machinery, anchors)
and all appurtenances, in rem;)
WOODBINE ALASKA FISH CO.,)
in personam; and GUY FERRARI, INC,)
in personam.)

Defendants,)

Case No. A-04-0147 CI
IN ADMIRALTY

ANSWER OF WOODBINE
ALASKA FISH CO., AND GUY
FERRARI INC., TO SECOND
AMENDED COMPLAINT IN
REM AND IN PERSONAM BY
CITICAPITAL COMMERCIAL
CORP.

Defendants WOODBINE ALASKA FISH COMPANY AND GUY FERRARI INC.,

(collectively, the "Defendants"), by and through their undersigned counsel, submit their

1 answer to the second amended complaint of Plaintiff CITICAPITAL COMMERCIAL
 2 CORP. ("Plaintiff"). Defendants hereby incorporate herein by reference their claims of the
 3 vessels the NAKNEK SPIRIT and EGEGIK SPIRIT made in August 2004 pursuant to
 4 Supplemental Admiralty Rule C(6) and, pursuant to Federal Rules of Civil Procedure §§ 8,
 5 10, and 12, respond to the complaint, admit, deny, and generally deny each and every
 6 allegation in the second amended complaint, and further deny that Plaintiff has suffered any
 7 damage in the sum or sums alleged, or in any sum at all, or is otherwise entitled to the relief
 8 sought or any relief whatsoever as follows:
 9

10 1. Defendants admit the allegations contained in paragraph 1 of the complaint.

11 2. Defendants lack sufficient information to admit or deny the allegations
 12 contained in paragraph 2 of the complaint and therefore deny same.
 13

14 3. Defendants admit the EGEGIK SPIRIT is owned by Woodbine Alaska Fish
 15 Company, an Alaskan Corporation, and deny the remainder of the allegations contained in
 16 paragraph 3 of the complaint.

17 4. Defendants admit the NAKNEK SPIRIT is owned by Guy Ferrari Inc, a
 18 California Corporation, and deny the remainder of the allegations contained in paragraph 4
 19 of the complaint.
 20

21 5. Defendants admit Woodbine Alaska Fish Company is an Alaskan
 22 Corporation and Guy Ferrari Inc. is a California Corporation and deny the remainder of the
 23 allegations contained in paragraph 5 of the complaint.

24 6. Defendants admit, without prejudice, and based upon their present
 25 information and belief, the execution and delivery of the Promissory Note, but deny the
 26 remainder of the allegations contained in paragraph 6 of the complaint.
 27
 28

7. Defendants admit certain preferred ship mortgages were entered into with respect to NAKNEK SPIRIT and the EGEGIK SPIRIT, however, Defendants either lack sufficient information to admit or deny the remainder of the allegations or such allegations call for a legal conclusion and therefore do not call for an admission of facts. As such, Defendants deny the remainder of the allegations contained in paragraph 7 of the complaint.

8. Defendants deny the allegations contained in paragraph 8 of the complaint.

9. Defendants assert that the Note provides for certain costs in collection however, affirmatively assert that Plaintiff's collection efforts were unreasonable, and deny that Plaintiff is entitled to any collection costs.

10. Defendants admit that they signed several documents in connection with the underlying loan. Defendants admit based on information and belief that a check for \$7,500 that was paid to Plaintiff in connection with the loan was returned due to insufficient funds. Defendants lack sufficient information to admit or deny, and as such deny, the remainder of the allegations contained in paragraph 10 of the complaint.

11. Defendants admit that they paid at least \$678.09. Defendants lack sufficient information to admit or deny, and as such deny, the remainder of the allegations contained in paragraph 11 of the complaint.

AFFIRMATIVE DEFENSES

FIRST AFFIRMATIVE DEFENSE (Failure to State Sufficient Facts)

The Second Amended Complaint, and each purported claim therein, fails to state facts sufficient to constitute any cause of action against Defendants.

SECOND AFFIRMATIVE DEFENSE
(Failure to State a Claim)

The Second Amended Complaint, and each purported claim therein, fails to state any claim upon which relief can be granted.

THIRD AFFIRMATIVE DEFENSE
(Statute of Limitations)

The Second Amended Complaint, and each purported cause of action alleged therein against Defendants, is barred by all applicable statute of limitations provisions.

FOURTH AFFIRMATIVE DEFENSE
(Failure to Mitigate)

To the extent that Plaintiff has failed to mitigate, minimize, or avoid any damages allegedly sustained, any recovery against Defendants, if any, must be reduced accordingly.

FIFTH AFFIRMATIVE DEFENSE
(Due Care)

Defendants have at all times exercised due care concerning actions, conduct, or other matters alleged in the complaint, or any purported claim asserted therein.

SIXTH AFFIRMATIVE DEFENSE
(Comparative Fault)

Defendants allege that if they were found to have any liability to Plaintiff, which they expressly deny, that this Court must reduce the liability of Defendants in proportion to the comparative fault of Plaintiff and others.

SEVENTH AFFIRMATIVE DEFENSE
(Contributory Negligence)

Persons and entities, other than Defendants or their agent(s), were negligent and at fault in connection with the acts alleged to have resulted in damages, and by reason thereof,

1 Plaintiff's right of recovery against Defendants should be reduced by the amount which the
 2 negligence and/or fault of persons and entities other than Defendants or their agent(s),
 3 caused or contributed to any alleged damage.
 4

5 EIGHTH AFFIRMATIVE DEFENSE
 6 (Failure to Fully Set Out Claims)

7 Defendants allege that Plaintiff has failed to set out its claims with sufficient
 8 particularity to enable Defendants to raise all appropriate defenses and, thus, Defendants
 9 reserve their right to add additional defenses as the factual basis for these claims becomes
 10 known.

11 NINTH AFFIRMATIVE DEFENSE
 12 (Unclean Hands, Inequitable Conduct)

13 Plaintiff's conduct is barred, in whole or in part, by its own unclean hands and
 14 inequitable conduct.

15 TENTH AFFIRMATIVE DEFENSE
 16 (Waiver, Laches, Estoppel)

17 Plaintiff's conduct is barred, in whole or in part, by the doctrines of waiver, laches,
 18 and estoppel.

19 ELEVENTH AFFIRMATIVE DEFENSE
 20 (Unreasonable Expenses)

21 Plaintiff is not entitled to the advancement it seeks because the nature and size of
 22 litigation expenses sought by it are unreasonable.

23 TWELFTH AFFIRMATIVE DEFENSE
 24 (Agreement is Not Fully Integrated)

25 These answering Defendants are informed and believe and thereon allege that if
 26 there presently exists or ever existed, any or all of the alleged rights, claims or obligations
 27
 28

1 Plaintiff seeks are unenforceable because the written agreement alleged in the complaint is
2 not fully integrated.

3
4 THIRTEENTH AFFIRMATIVE DEFENSE
(Mutual Mistake)

5 These answering Defendants are informed and believe and thereon allege that if
6 there presently exists or ever existed, any or all of the alleged rights, claims or obligations
7 which Plaintiff seeks are unenforceable by reason of mutual mistake.
8

9 FOURTEENTH AFFIRMATIVE DEFENSE
10 (Equitable Estoppel)

11 These answering Defendants allege that Plaintiff herein, and each and every Cause
12 of Action contained in the complaint, are barred by reason of acts, omissions,
13 representations and courses of conduct by Plaintiff by which Defendants were led to rely to
14 their detriment, thereby barring, under the doctrine of equitable estoppel, any causes of
15 action asserted by the Plaintiff.
16

17 FIFTEENTH AFFIRMATIVE DEFENSE
(Equitable Estoppel)

18 Plaintiff is estopped to deny that the contract was modified by the oral agreements
19 alleged herein because Defendants were repeatedly misled into believing that the vessels,
20 the EGEGIK SPIRIT and the NAKNEK SPIRIT would be released by Plaintiff, and instead,
21 Plaintiff continued the arrests and eventually sold the vessels at auction for less than the
22 amounts of the loan. Defendants relied on the terms of the modified contract to their
23 detriment.
24

SIXTEENTH AFFIRMATIVE DEFENSE
(Modification of Contract)

These answering Defendants allege that on or about July 24, 2004, Plaintiff and Defendants made an oral agreement to release the vessels the EGEGIK SPIRIT and the NAKNEK SPIRIT. The purpose of the oral agreement was to modify the written contract alleged in the complaint. The oral agreement was supported by valuable and new consideration in that Defendants agreed to obtain insurance on the vessels and agreed to pay Plaintiff from the proceeds of fish sales. Defendants have performed all of the conditions of the contract, as modified, on their parts to be performed in accordance with the terms of the contract as modified.

SEVENTEENTH AFFIRMATIVE DEFENSE
(Modification of Contract)

These answering Defendants allege that on or about July 25, 2004, Plaintiff and Defendants made an oral agreement to release the vessels the EGEGIK SPIRIT and the NAKNEK SPIRIT. The purpose of the oral agreement was to modify the written contract alleged in the complaint. The oral agreement was supported by valuable and new consideration in that Defendants agreed that they would pay Plaintiff \$43,940.82. Defendants have performed all of the conditions of the contract, as modified, on their parts to be performed in accordance with the terms of the contract as modified.

EIGHTEENTH AFFIRMATIVE DEFENSE
(Modification of Contract)

These answering Defendants allege that on or about July 26, 2004, Plaintiff and Defendants made an oral agreement to release the vessels the EGEGIK SPIRIT and the NAKNEK SPIRIT. The purpose of the oral agreement was to modify the written contract

1 alleged in the complaint. The oral agreement was supported by valuable and new
 2 consideration in that Defendants agreed that they would pay \$79,487.65 and agreed to
 3 obtain insurance coverage for the vessels. Defendants have performed all of the conditions
 4 of the contract, as modified, on their parts to be performed in accordance with the terms of
 5 the contract as modified.
 6

7
 8 NINETEENTH AFFIRMATIVE DEFENSE
 9 (Modification of Contract)

10 These answering Defendants allege that on or about August 1, 2004, Plaintiff and
 11 Defendants made an oral agreement to release the vessels the EGEGIK SPIRIT and the
 12 NAKNEK SPIRIT. The purpose of the oral agreement was to modify the written contract
 13 alleged in the complaint. The oral agreement was supported by valuable and new
 14 consideration in that Defendants agreed that they would pay \$125,000 and agreed to obtain
 15 insurance coverage for the vessels. Defendants have performed all of the conditions of the
 16 contract, as modified, on their parts to be performed in accordance with the terms of the
 17 contract as modified.
 18

19 TWENTIETH AFFIRMATIVE DEFENSE
 20 (Modification of Contract)

21 These answering Defendants allege that on or about August 6, 2004, Plaintiff and
 22 Defendants made an oral agreement to release the vessels the EGEGIK SPIRIT and the
 23 NAKNEK SPIRIT. The purpose of the oral agreement was to modify the written contract
 24 alleged in the complaint. The oral agreement was supported by valuable and new
 25 consideration in that Defendants agreed that they would pay \$125,000 and agreed to obtain
 26 excess insurance coverage for the vessels. Defendants have performed all of the conditions
 27
 28

1 of the contract, as modified, on their parts to be performed in accordance with the terms of
 2 the contract as modified.

3 TWENTY-FIRST AFFIRMATIVE DEFENSE
 4 (Modification of Contract)

5 These answering Defendants allege that on or about August 10, 2004, Plaintiff and
 6 Defendants made an oral agreement to release the vessels the EGEGIK SPIRIT and the
 7 NAKNEK SPIRIT. The purpose of the oral agreement was to modify the written contract
 8 alleged in the complaint. The oral agreement was supported by valuable and new
 9 consideration in that Defendants agreed that they would pay \$125,000, agreed to obtain
 10 excess insurance coverage for the vessels, and agreed to submit a proposed business plan.
 11 Defendants have performed all of the conditions of the contract, as modified, on their parts
 12 to be performed in accordance with the terms of the contract as modified.
 13

14 TWENTY-SECOND AFFIRMATIVE DEFENSE
 15 (Lack of Subject Matter Jurisdiction)

16 These answering Defendants allege that this Court does not have subject matter
 17 jurisdiction over this case.

18 TWENTY-THIRD AFFIRMATIVE DEFENSE
 19 (Lack of Subject Matter Jurisdiction)

20 These answering Defendants allege that any valid contract, preferred ship mortgage,
 21 promissory note and modifications thereto as well as the issues in this case are subject to
 22 the laws of the State of Texas.

23 TWENTY-FOURTH AFFIRMATIVE DEFENSE
 24 (Modification of Promissory Note)

25 These answering Defendants allege that the Promissory Note was modified by the parties'
 26 subsequent agreement, and that Plaintiff was therefore not entitled to accelerate the Note.
 27

TWENTY-FIFTH AFFIRMATIVE DEFENSE
(Workout Agreement)

These answering Defendants allege that the parties reached a workout agreement whereby Plaintiff would release the vessels EGEGIK SPIRIT and NAKNEK SPIRIT and Defendants would continue making payments.

TWENTY-SIXTH AFFIRMATIVE DEFENSE
(In the Alternative)

In the alternative, should the Court determine that, at the time of contracting, Plaintiff and Defendants did not share a common intent with respect to the effect of Plaintiff's exercise of the Promissory Note and the two Preferred Ship Mortgages against the aforementioned vessels and Security Agreements alleged therein, then there was no mutual assent ("meeting of the minds") on the issue, and Defendants have no obligation to Plaintiff as to any disputed portion thereof.

WHEREFORE, Defendants pray for judgment as follows:

1. That Plaintiff takes nothing by reason of the complaint;
2. That if Defendants are found liable, the degree of the responsibility and liability for the resulting damage be determined and that Defendant be liable only for that portion of the total damage in proportion to their responsibility for the same;
3. That Plaintiff's improper prayer for attorney's fees be stricken and summarily denied;
4. That the vessels be released forthwith;

1 5. That Defendants be awarded costs of suit herein, attorneys fees, and such
2 other further relief as the Court deems just and proper.

3 Dated: 31 May 2006

BIRNBERG & ASSOCIATES

By: s/Cory Birnberg

Cory A. Birnberg

BIRNBERG & ASSOCIATES

CORY A. BIRNBERG

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Attorneys for Cross-Complainants

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VERIFICATION

I, Cory A. Birnberg, personally prepared the foregoing Verified Answer and state that the contents thereof are true to the best of my knowledge based upon information and documentation supplied to me by Defendant WOODBINE ALASKA FISH COMPANY, INC and GUY FERRARI INC. I have been authorized to sign this Verification on behalf of Defendants who are currently outside this jurisdiction and are unable to execute the Verification for themselves.

Dated: 31 May 2006

BIRNBERG & ASSOCIATES

By: s/Cory Birnberg

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BIRNBERG & ASSOCIATES
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1 Certificate of service

2 The undersigned hereby certifies that on this 31st day of May 2006, a true and correct copy
3 of Declaration in support of application for entry of clerks default was sent via FACSIMILE
4 and FIRST CLASS U.S. MAIL to:

5 Mark C. Manning
6 431 West 7th Avenue, Suite 204
7 Anchorage, AK 99501-3583
8 Facsimile: 907-278-1169

9 BIRNBERG & ASSOCIATES

10 By: s/Cory Birnberg

11 Cory A. Birnberg
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